Filed 9/20/04 Tucker v. Mariposa County Unified School Dist. CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

DARRELL TUCKER,

Plaintiff and Appellant,

v.

MARIPOSA COUNTY UNIFIED SCHOOL DISTRICT et al.,

Defendants and Respondents.

F043863

(Super. Ct. No. 8426)

OPINION

APPEAL from a judgment of the Superior Court of Mariposa County. Wayne R. Parrish, Judge.

Bennett & Sharpe, Inc., Barry J. Bennett, Thomas M. Sharpe and Joseph M. Arnold for Plaintiff and Appellant.

Auchard & Stewart and Paul Auchard for Defendants and Respondents.

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This is an appeal from a judgment denying the petition for writ of administrative mandate filed by appellant Darrell Tucker. We will affirm the judgment.

The core issue here concerns the degree to which an administrative body, in this case respondent Governing Board of the Mariposa County Unified School District (hereafter the Board), may reject findings of fact by an administrative law judge (ALJ) and substitute the body's own findings and inferences from such findings. We conclude

the Board was not bound by the ALJ's findings of fact and that the Board's own findings and conclusions are supported by substantial evidence.

FACTS AND PROCEDURAL HISTORY

Appellant was a mechanic and substitute school bus driver, employed since 1992 by respondent school district (hereafter respondent). On April 11, 2002, appellant unexpectedly was summoned to drive a morning bus route. As a result of the late call, appellant arrived at the bus yard and hurried through the mandatory pretrip inspection. He entered on the inspection report a figure for brake pressure that either reflected an unsafe pressure or did not reflect the true gauge reading that morning. He may or may not have removed locking pins from the emergency doors on the bus, but another driver discovered the pins in place later that morning. Appellant drove the morning route without incident.

Because he had hurried to work, appellant appeared somewhat disheveled when he arrived at the bus yard. His supervisor noticed that appellant's breath was foul, as did another employee. Later in the morning, sometime after he returned from the bus route, several employees noticed appellant's breath smelled of alcohol. One employee who noticed the smell of alcohol told appellant to go home at lunch and clean up. Appellant did so and worked the rest of the day without incident. None of the employees reported their suspicions of alcohol use to appellant's immediate supervisor, although they did discuss the matter among themselves.

The following Monday, April 15, 2002, respondent placed appellant on paid administrative leave pending investigation of the issues. On May 22, 2002, he was suspended without pay and terminated from employment. Appellant contested this action and the matter was referred for hearing before an ALJ. After hearing, the ALJ issued a proposed decision in which she found appellant had failed adequately to perform the pretrip inspection and had failed to remove the emergency door locking pins. She found

the charge of alcohol use not proved. She recommended appellant be suspended without pay for five days rather than terminated.

The Board saw the matter differently. After obtaining a transcript of the administrative hearing and reviewing the record, the Board (by unanimous vote of the three members in attendance) adopted a final decision that found all charges established. The Board affirmed termination of appellant's employment as of May 22, 2002.

Appellant filed a timely petition for writ of administrative mandate, naming the Mariposa County Unified School District and the Board. (See Code Civ. Proc., § 1094.5.) After independent review of the administrative record, the trial court entered its order denying the writ of mandate. The court stated that, applying the independent judgment standard of review, it "reweighed the evidence independent of the conclusions of the agency and … determined that the findings of the Mariposa Unified School District are supported by the weight of the evidence; specifically, the preponderance of the evidence supports the findings" of the Board.

Appellant filed a timely notice of appeal.

DISCUSSION

Appellant acknowledges that we must review the trial court's determination pursuant to the substantial evidence test. We determine whether substantial evidence supports the trial court's independent determination that the weight of the evidence supports the administrative findings of the Board, sitting as the administrative tribunal. (*Moran v. Board of Medical Examiners* (1948) 32 Cal.2d 301, 308; see *Governing Board v. Haar* (1994) 28 Cal.App.4th 369, 378-479.)

Nevertheless, appellant contends "that the procedural history of this case, and the underlying record … will lead the appellate court to reverse the decision below as both unsupported by substantial evidence and as the perpetration of a substantial injustice" to appellant.

A. "Substantial Injustice"

In arguing that the Board committed a substantial injustice, appellant contends all facts relied upon by the ALJ are supported by the record and there is no substantial evidence to support the Board's determination to reject the ALJ's proposed decision. He observes the ALJ heard the live testimony and the Board's final decision did not point out any errors in the proposed decision.

Under the administrative procedures adopted by respondent for personnel actions, the Board is permitted to adopt an ALJ's proposed decision, reduce the recommended penalty and adopt the remainder of the decision, or "[r]eject the proposed decision in its entirety." Appellant does not contend these procedures are infirm under governing statutes, which respondent's procedures mirror. (See Gov. Code, § 11517.)

Appellant cites no authority for the proposition that an agency must specify its disagreements with an ALJ's proposed decision. The governing statute simply requires that the agency reject the proposed decision and notify the parties it will decide the matter itself. (Gov. Code, § 11517, subd. (c)(2)(E).) An agency's rejection of an ALJ's proposed decision is a formality required to re-vest in the agency itself the jurisdiction to decide the case in place of an ALJ. (See *Pollack v. Board of Psychology* (1997) 55 Cal.App.4th 342, 346-347.) Just as there is no requirement for a statement of reasons for the initial referral of a matter to an ALJ for hearing (see Gov. Code, § 11517, subd. (a)), there is no requirement of a statement of reasons when the agency decides to hear the matter itself, either initially (see *ibid.*) or after receipt of the ALJ's proposed decision (see Gov. Code, § 11517, subd. (c)).

Subsequently, upon review of the record, the agency may agree or disagree, in whole or in part, with the conclusions originally made by the ALJ. (See *Alford v. Department of Motor Vehicles* (2000) 79 Cal.App.4th 560, 566-567.) When the agency decides the case, it is required to do so in writing, with a "concise and explicit statement of the underlying facts of record that support the decision." (Gov. Code, § 11425.50,

subd. (b).) Nothing in the governing statute requires the agency to state its reasons for disagreeing with conclusions of the ALJ.

Similarly, the sole question before the trial court was whether the evidence, independently reviewed, supports the Board's determination. The question is not whether that evidence might support a different determination, including the different determination already offered by the ALJ. (See *Trustees of Cal. State University v. Public Employment Relations Bd.* (1992) 6 Cal.App.4th 1107, 1123.)

Appellant also contends the Board violated his right to due process by finding an additional ground for termination that was not specified in the original notice of termination. Respondents concede the Board should not have relied upon the new ground, a regulatory provision that a driver shall not operate a bus when fatigue would adversely affect his or her ability. (See Cal. Code Regs., tit. 13, § 1214.) Respondents made this concession in the trial court and there was no further discussion of the issue after that concession.

Appellant does not contend the Board's original error prejudiced him in any manner. In light of the more serious charges found true, we conclude it is not reasonably probable appellant would have obtained a more favorable result in the absence of the Board's error. (*People* v. *Watson* (1956) 46 Cal.2d 818, 836.)

B. Substantial Evidence

Appellant notes that there is no evidence anyone saw appellant drinking alcohol at work, that no one conducted a field sobriety test, and no one reported "any observations" to appellant's supervisor. As a result, asserts appellant, there was no substantial evidence he "had in fact consumed alcohol on or near his duty time."

To the contrary, ample evidence supported the Board's conclusion. Several witnesses testified they did not smell alcohol on appellant's breath early in the morning, but that they smelled it closer to lunchtime. This clearly supports an inference that appellant consumed alcohol while he was at work. In addition, uncontradicted testimony

established appellant was wearing sunglasses indoors later in the morning. Finally, when confronted by a workmate about the smell of alcohol, appellant did not deny that he smelled of alcohol, but sought to explain the smell by explaining he had wine with dinner the night before.

Appellant acknowledges substantial evidence supports the finding he failed to properly perform the pretrip inspection, but he argues that the evidence does not show he "deliberately falsified" the inspection report. He focuses on his entry of the substandard brake pressure entry and shows how that could have been an innocent mistake.

Quite apart from that, however, appellant filled out the report as if he had performed the required inspection of the bus, when he did not in fact perform the inspection. Regardless of inadvertent mistakes in filling out the form, appellant clearly acted intentionally in filling out the form as if he had done the inspection. We note that the Board determined that appellant *correctly* recorded the low brake pressure and drove the bus anyway. Accordingly, in the logic of the Board's decision, entry of the brake pressure figure could not have been the basis for concluding appellant falsified the inspection report.

Finally, appellant contends the Board found that he had violated policy by replacing the locking pins in the emergency doors. This mischaracterizes the Board's conclusion: The Board concluded appellant had not pulled the pins when he began his morning trip, as required by regulations. Based on all of the evidence, the Board concluded appellant's claim to have pulled the pins and then replaced them was not credible. Substantial evidence supports this conclusion, and appellant does not contend such evidence is lacking.

C. Termination

Appellant contends we should remand this matter for reconsideration of the Board's imposition of termination of employment as the penalty imposed upon him. He

says this is necessary and appropriate if we agree "the alcohol and falsification charges were never proven by any evidence."

Because we have concluded substantial evidence supports the trial court's decision in all respects, we do not reach this issue.

DISPOSITION

The judgment denying appellant's petition for writ of mandate is affirmed. Respondents are awarded costs on appeal.

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VARTABEDIAN, Acting P. J.

WE CONCUR:

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HARRIS, J.

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WISEMAN, J.